

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

LOS ANGELES UNIFIED SCHOOL
DISTRICT.

OAH CASE NO. 2012090139

DECISION

Eileen M. Cohn, Administrative Law Judge (ALJ), from the Office of Administrative Hearings (OAH), heard this matter on October 30, and 31, 2012, in Los Angeles, California.

Student's mother (Mother) represented Student. Mother attended both hearing days. Student and Student's father attended the hearing on October 30, 2012.

Patrick Balucan, Attorney at Law, represented the Los Angeles Unified School District (District). Diana Massaria, Coordinator, Department of Compliance, Support and Monitoring, attended the hearing as District's representative. Katheryn Moran, Intern, Office of General Counsel, accompanied Mr. Balucan on October 30, 2012.

A Spanish-language interpreter, Paula Carreón, was duly sworn and present throughout the hearing to provide Mother with simultaneous translation of the proceedings, and to provide English-language translation of Mother's testimony and witness examination.

Student filed his request for due process hearing (complaint) on September 4, 2012. On October 31, 2012, based upon the stipulation of the parties, the matter was continued for receipt of written closing arguments, to November 28, 2012. The parties timely lodged written closing arguments, and on November 28, 2012, the matter was submitted and the record closed.

ISSUES¹

1. Whether Student was denied a free appropriate public education (FAPE), such that Student should be provided an independent educational evaluation (IEE) at public expense, because District's speech and language (LAS) assessment dated March 13, 2012, was not properly conducted.
2. Whether District denied Student a FAPE in its individualized education program (IEP) offer of April 17, 2012, by failing to offer nonpublic agency (NPA) LAS services for 60 minutes per week.
3. Whether District denied Student a FAPE in its IEP offer of April 17, 2012, by failing to offer at-home NPA behavior intervention services including: direct one-on-one behavior intervention implementation (BII) services for a total of 300 minutes, weekly; and NPA behavior intervention development (BID) supervisor services for a total of 240 minutes, monthly.
4. Whether District denied Student a FAPE in its IEP offer of April 17, 2012, by failing to offer appropriate supports during transitions and meal times at school.

FACTUAL FINDINGS

Jurisdiction and Background Information

1. Student is a 19-year-old young man, who, at all relevant times, resided with his parents and sibling in the District, and attended District's Huntington High School (Huntington).² Student was assessed and found eligible for special education in January 1998 under the eligibility category of autism-like behaviors. Student is currently enrolled as a 12th grader in a special day program (SDP) for autistic pupils.
2. Student's cognitive functioning was several years behind his same-aged typical peers. He had receptive and expressive vocabulary deficits, demonstrated by his difficulties with words that have multiple meanings and his inability to formulate descriptive or complex sentences. He often expressed his needs and wants in utterances of up to five words, but generally relied on three word utterances. He consistently omitted parts of sentences, including articles, prepositions, tense verb endings, and suffixes. He had

¹ The issues were clarified and confirmed at the prehearing conference and the first morning of the hearing.

² Student was over 18 at the time Mother filed the due process hearing request on his behalf. As an adult, Student was the holder of his educational rights, unless he was deemed incompetent under California law. (Ed. Code, §56041.5.) Mother is Student's conservator, and as such, his educational rights are held by Mother on his behalf.

difficulty responding to “when,” “how,” and “why” questions. His reading comprehension skills were limited. He identified upper and lower case letters, and with time and prompting, he decoded one or two syllable words. He identified some important signage, such as safety signs, and traffic lights. He wrote neatly, could write his name, and copy words from the board, but his ability to write sentences was limited. He received functionally-oriented academic instruction, which utilized alternative curriculum and alternative achievement standards. Functional curriculum was designed to advance pupils’ ability to function independently and be self-sufficient. Student expressed an interest in working with his father in his automotive repair business when he completed his education.

3. District designated Student as an English-language learner. Spanish was the primary language spoken in Student’s home. At home Student communicated by speaking in Spanish and English, and by pointing. At school, Student preferred communicating in English and made his preference known when spoken to in Spanish.

4. Student had received LAS services since 2003 to address his limited verbal language and articulation skills. At the time of the hearing, Student was receiving one hour a week of one-on-one NPA LAS therapy, and 30 minutes a week of group LAS therapy at school.

5. Student had a history of behavioral challenges arising from his limited verbal language and articulation skills. When frustrated, angry or frightened, Student engaged in self-injurious behaviors like hitting or scratching. Beginning in 2007, Student received in-home behavior intervention services from an NPA through California’s Lanterman Act to address Student’s anger control and toileting challenges that occurred at home, but not at school. Lanterman Act services are not special education related services.

6. At an IEP team meeting conducted in spring 2008, prior to Student’s transition to high school, the team did not observe any negative behaviors at school, and noted that Student was polite and followed directions. A behavior support plan (BSP) was developed for high school to address off task behavior which impaired Student’s ability to complete class work. Mother and District agreed that Student no longer required Student’s BII and BID services at school. Mother agreed that adult assistance (AA) alone was appropriate in high school to keep Student focused.

7. In April 2009, District conducted a functional behavior assessment (FBA), which used observations to evaluate Student’s behaviors at school. From the FBA report, the IEP team determined that Student did not display any behaviors that impeded his access to education, or required remediation. The assessor observed Student to be sweet, compliant, cheerful, friendly to others, (greeting others with “hello”), and engaged. The assessor did not observe any self-injurious or dangerous behaviors. Student did become withdrawn on occasion, but would join a group at the teacher’s instruction. District utilized a BSP to address Student’s challenges with peer interaction.

8. In October 2009, District began funding an NPA to provide Student at-home BII services for 300 minutes, or 5 hours weekly, and BID services, for 240 minutes, or 4 hours monthly. The services addressed a goal related to Student's self-injurious behaviors. The BII and BID taught Student and Mother strategies for coping with Student's maladaptive behaviors, including deep breathing, pressing a squeeze ball, verbalizing feelings, and distracting Student.

9. At the April 20, 2011, IEP team meeting, the team reviewed the report of the NPA behavior provider, represented by Gizelle Torres, who testified at hearing. Ms. Torres was a qualified BII and BID provider, and provided Student BII and BID services during her tenure at the NPA. Ms. Torres provided clear and unambiguous testimony based upon her direct conversations with Mother parent and Student's BII and her direct observations of Student in the home. She did not indulge any speculation, and did her best to answer honestly. Her testimony was given great weight in determining the appropriateness of continuing NPA BII and BID services.

10. Ms. Torres reported that Student did not engage in any self-injurious behaviors, even when he was observed to be startled, scared or frustrated. She reported that Student was able to effectively use the coping strategies the behaviorist taught him.

11. Mother insisted that Student continued to engage in self-injurious behaviors and required adult intervention. Based upon Mother's observations, the IEP team continued BII and BID home services to increase Student's ability to use his coping tools independently without adult intervention, to ensure his safety. The IEP team characterized the continued support as a fading plan. The IEP team developed a goal for home-based BII and BID services. The behaviorist and Student's parents were to work on Student's coping strategies when he was frustrated, scared, and angry, to eliminate Student's self-injurious behaviors in four of five trials.

12. As reported to the April 2011 IEP team, Student did not engage in any self-injurious behaviors at school. Student engaged in "off-task" behavior, meaning he became distracted from his assigned school work. Student returned to his school work with a simple look or verbal instruction from his teacher. The team developed a BSP to address Student's lack of organization, which diminished the time he devoted to instruction, and impeded his access to education. BII and BID was not offered for the school day.

13. Mother consented to the BII and BID goals and at-home services.

14. The April 2011 IEP team reported on Student's LAS needs and services in the area of speech intelligibility and articulation. Informal observations of Student and through his ongoing therapy sessions, demonstrated that Student's intelligibility for multisyllabic words and small phrases had improved. Student's intelligibility was "fair." His breath support and range and speed of articulation-related muscles increased. Despite progress, articulation errors persisted which impaired his ability to speak intelligibly and to access his education.

15. The April 2011 IEP team developed one LAS goal, to be used in his one-on-one speech therapy, to enhance his speech sound intelligibility and sentence structure in speech activities by using compensatory strategies such as self-monitoring and correction with 75 percent accuracy in three of five trials with moderate cues and prompts from a speech clinician. The April 2011 IEP team developed one other LAS goal, to be used at school, to use the same compensatory strategies with 70 percent accuracy in three of five trials, in both structured and unstructured activities.

16. The April 2011 IEP team offered one-on-one NPA LAS for 60 minutes per week, and 30 minutes per week, of school-based speech, within the classroom. The school-based LAS was provided collaboratively by either or both the speech and language therapist and the classroom special education teacher.

17. Mother consented to the LAS goals and services.

18. Mother objected to the District's failure to offer a one-on-one assistant to Student to supervise his academic instructions and ensure his safety during transitions between classrooms. With regard to academics, District responded that there was a system in place among the special and general education teachers, which accommodated his needs. With regard to supervision, District responded that supervision was provided on campus throughout the school day, before and after school.

2011-2012 School Year

19. Jeffrey Yeung, who testified at hearing, was Student's special education classroom teacher during the 2011-2012 school year. At hearing, Mr. Yeung presented himself as a caring and responsible teacher, and demonstrated that he was familiar with Student. Mr. Yeung was Student's teacher in most of his classes during the 2011-2012 school year, and continuing through the 2012-2013 school year. Mr. Yeung taught English, mathematics, social science, and science to Student. During the 2011-2012 school year he co-taught music and computers. During the 2012-2013 school year, he co-taught leadership. The only courses Mr. Yeung was not involved with were physical education and art. Mother appreciated Mr. Yeung's work with Student, and disagreed only with the level of assistance required for her son. Mr. Yeung's classroom and school-based observations were consistent with other District witnesses and were not challenged by contrary evidence. As such, Mr. Yeung's observation of Student's behavior at school was given great weight.

20. Mr. Yeung's SDP class included 20 pupils and four aides. Student participated in general education classes, including art and computers, which required him to transition between classrooms. SDP pupils generally traveled in groups. Classroom aides accompanied SDP pupils in the hallways, at restroom breaks, and in the lunch room, but at a distance to encourage their independence. There was no evidence that Student had any difficulty maneuvering between classrooms, attending to his hygiene, or handling his lunch room routines without more individualized assistance.

21. Mr. Yeung was a relatively new special education teacher during the 2011-2012 school year, in his second year of teaching under an interim state credential. He was working on his masters of arts in special education, which he expected to receive in May 2013, along with his permanent state credential. In addition to his teaching responsibilities, Mr. Yeung was the case manager for 22 special education pupils at Huntington. In that capacity he was responsible for ensuring the implementation of their IEP's.

22. On March 16, 2012, the IEP team met again to prepare for Student's April 2012 annual IEP. The IEP team discussed Student's LAS services. Mother agreed to allow District to conduct a LAS assessment to determine the appropriateness of continuing Student's LAS services. District agreed to offer NPA LAS services through the April 2012 annual IEP. The IEP team discussed Student's BII and BID. Mother agreed that District should conduct an FBA to collect more current data on Student's behaviors and to determine the appropriateness of BII and BID in the April 2012 annual IEP.

District's LAS assessment

23. In February, and March 2012, District conducted an LAS assessment in preparation for the annual IEP, which was completed on March 13, 2012. Terry McAllister-James, District's speech-language pathologist, who testified at trial, conducted the assessment. Ms. McAllister-James had all the necessary qualifications required of a school speech pathologist in the State of California. Ms. McAllister-James has been a District speech pathologist for over 24 years, her entire career. Ms. McAllister-James was an itinerant speech pathologist, meaning that she was assigned to many schools at once. From January through June, 2012, she was assigned to Huntington as a speech pathologist. Ms. McAllister-James was a credible witness. She was careful with her answers and responded candidly to District's question with her statement that the standardized Golden-Frisco assessment was not normed for atypical pupils, like Student. However, Ms. McAllister-James's wholehearted affirmation of Student's intelligibility was inconsistent with the observation of his NPA speech and language provider, Student's present levels of performance, her own assessments and Mother's observations of Student's abilities outside of scripted and typical school conversations. For this reason, more weight was given to the testimony of Student's NPA speech provider, Ms. Torres, when considering the propriety of District's April 17, 2012, LAS offer.

24. At the time of Ms. McAllister-James's assessment, Student had been receiving LAS services targeting speech intelligibility and language skills for 10 years. In her assessment, Ms. McAllister-James considered Student's progress on his most recent LAS school-based goal to improve speech intelligibility using compensatory strategies with 70 percent accuracy in three of five trials, in both structured and unstructured activities. According to Ms. McAllister-James, at the time of her assessment Student had achieved this annual goal including all objectives.

25. Ms. McAllister-James's assessment report stated that interviews with Student's Mother and teacher were conducted, but the report did not reference any statements from Student or his teacher.

26. In her assessment, Ms. McAllister-James considered her observations in the speech therapy room during weekly group speech. She reported that Student's overall clarity of speech was fair to good and he was able to "acceptably" express his wants, needs, thoughts, and ideas.

27. As part of her assessment she also administered standardized LAS assessments including: the Goldman-Fristoe test of articulation, the Expressive One-Word Picture Vocabulary Test (EOWPVT), which measures the pupil's ability to name objects, actions and concepts pictured in illustrations, and the Receptive One-Word Picture Vocabulary Test (ROWPVT), which measures the pupil's ability to understand the meaning of single words.

28. Ms. McAllister-James did not administer any of the standardized assessments in Spanish, Student's primary language. There was no evidence Ms. McAllister-James was qualified as a bi-lingual speech and language pathologist, but she reported that she administered the standardized assessments in English because Student insisted on using only English. Ms. McAllister-James acknowledged at hearing that scores might differ, and even be higher, if he was assessed in his primary language.

29. The Golden-Fristoe measured Student's articulation of consonant sounds. It was normed for typical pupils between the age of two and 21. Student scored below one percentile of his chronological peers. Student was 18 years and six months of age at the time of testing. His error sounds included "th," "z," and "m."

30. Ms. McAllister-James made a more optimistic assessment of Student's articulation skills than the scores from the Golden-Fristoe suggested. She confirmed that Student's developmental age was well below his chronological age, and consequently the age of the normed testing population. Ms. McAllister-James concluded that Student demonstrated "fairly good articulatory ability for his decreased developmental age."

31. Ms. McAllister-James's administered the EOWPVT and the ROWPVT for "purposes of comparison" only. The test was not normed for Spanish-language speakers. Ms. McAllister-James did not explain what weight, if any, the measures were given, or what she meant by "purposes of comparison." With regard to the EOWPVT, Student was able to name many objects, actions and concepts up to the 12 year, 11 month level. Based upon his responses to the English-language assessment, his age equivalent was four through nine years, and his percentile rank was below one percent. With regard to the ROWPVT, Student was able to receptively identify many of the pictures by pointing. Based upon his responses, Student's age equivalent was five years, one month, and his percentile rank was below one percent.

32. As part of her assessment, Ms. McAllister-James reviewed a “language sample,” an observation-based and nonstandardized measure, to assess Student’s ability to “produce language in natural contexts.” Included in the language sample were her conversations with Student and picture description tasks. From her language sample, she concluded that Student could use up to five word utterances that were primarily declarative statements or questions. Consistent with reports of his present level of performance in previous IEP’s, Student’s sentences were often grammatically and syntactically incorrect.

33. Despite Student’s pronounced spoken language, and receptive and expressive language deficits, Ms. McAllister-James concluded that he was able to “express his wants, needs, thoughts and ideas” in three word utterances, and could ask and answer simple questions in “some detail” with minimal prompting. In reaching this conclusion, Ms. McAllister-James relied on her observations of Student producing multisyllabic words and small phrases, his ability to produce most English-language consonants, and his ability to express his wants, needs, thoughts, and ideas in utterances ranging from three to five words.

34. While acknowledging Student’s deficits in her report, and the impact of his deficits on his ability to access his education, her written report stated only that Student “may” require continued services to work on improving conversational intelligibility, and to communicate effectively in the classroom and with staff and peers. She deferred to the IEP team to determine special education services.

NPA speech and language report

35. In order to assist the IEP team, on April 11, 2012, Student’s NPA speech pathologist, Deanna Melvey, who testified at hearing, submitted a brief status report of Student’s progress in his weekly, 60 minutes, one-on-one sessions. Ms. Melvey had never observed Student at school, was not informed of the amount, frequency, and duration of his school therapy, or his progress at school. Her report was based solely on her observations of Student at the clinic. Ms. Melvey provided speech therapy to Student for several months before her report, although the NPA had been working with him before that time. She was a qualified and licensed speech pathologist, with three years of professional experience. Ms. Melvey reported that Student did not meet his goal of using compensatory strategies to improve speech intelligibility while participating in structured speech activities with 70 percent accuracy in 3/5 trials with moderate cues and prompts. He made progress towards improving speech intelligibility with 50 percent accuracy with regard to certain “wh” questions, using four to five word utterances by following verbal and visual instruction with minimal to moderate prompting. Student responded with difficulty to “when,” “how,” and “why,” questions, requiring moderate to maximum cues and/or visual stimuli. Consistent with Student’s previous reported challenges, he continued to omit parts of the essential components of sentences, including articles, prepositions, tense verb endings, and suffixes. Ms. Melvey reported that Student would benefit from continued LAS services. Student was pleasant, motivated and responded well to individual treatment and support.

Mr. Yeung's FBA report

36. On April 17, 2012, Mr. Yeung, prepared an FBA report. There was no evidence that Mr. Yeung had any training in behavioral assessments, and his experience conducting such assessments, including the FBA, was not disclosed.

37. Mr. Yeung reviewed Student's educational history to identify any pattern of significant behaviors in the school environment. As culled from his educational records, Student had not displayed any oppositional or self-injurious behaviors at school since 2009. Student's behavioral impediments to his education were his inability to stay on task and his disorganization. As to his teachers and classmates, Student was polite, pleasant and compliant.

38. Mr. Yeung interviewed Mother on April 16, 2012. Mother reported that Student was strong in routines, cleanliness, and hygiene. She observed self-stimulatory behaviors including flicking his pen with fingers, scrunching his back, and pacing back and forth and immediately stopping. She observed self-injurious behaviors including banging and slapping his right cheek with his right palm, hitting his hand with his right fist to the right side of his head, hitting himself with his shoe to his shin, and bending his fingers backwards. Mother reported that Student slapped his right cheek the night before when she told him to go to bed in the middle of a television show he was watching. Mother reported that Student transitioned after she hugged him, and asked him if he wanted to go to school the next day, a preferred activity, and after she gave him some time by leaving the room to attend to her other child. Mother also reported that Student used breathing relaxation techniques independently and with minor prompts.

39. Mr. Yeung reported his observations of Student. Mr. Yeung made general observations of his experience with Student in his class. He observed Student to be obedient, non-disruptive, caring and accommodating. Student was well mannered and greeted people appropriately. He tried to help others. During instruction, he attended to the speaker, and raised his hand appropriately. Student took small breaks by taking deep breaths or stretching, and, most of the time, could return to his task independently. When necessary, Mr. Yeung used verbal and visual prompts. Loud noises outside the classroom distracted Student, as did his election to discuss preferred topics, including the weather, trains and planes. Student did not demonstrate any self-injurious, aggressive, uncooperative or impulsive behaviors at school, nor was he withdrawn. Despite Student's need for breaks and prompting, Mr. Yeung stated that he was attentive. Student completed his work when given extra time.

40. Mr. Yeung also reported on his observations of Student transitioning between classes. Student was able to transition between classes independently, with minimal supervision.

41. Mr. Yeung memorialized the observations Student's general education art and computer teachers shared with him. Both Student's art teacher and computer teacher

observed that Student was polite, cordial, and cooperative. His computer teacher remarked that he was “great” during classroom routines such as cleaning up and putting things away. He understood and followed directions. Like Mr. Yeung, these teachers thought he was attentive, but noted that he sometimes needed prompting to return to tasks, especially if there were transitions in class instructions, but otherwise could return to tasks independently. His art teacher mentioned that he seemed at times withdrawn and did “drift off.” Like Mr. Yeung, they did not observe any disruptive, self-injurious or aggressive behavior. His computer teacher thought that his deficit was in the area of socialization with peers.

42. As part of Mr. Yeung’s report, he took data on Student’s conduct in his computer, science and art classes during a three day period, in four, 20 minute time blocks. He observed Student working on the computer, working on written worksheets for science and math, and during an exhibit of classroom art work.

43. Despite the uniform observation of Student’s teachers that he was attentive, Mr. Yeung’s data analysis showed that Student became distracted by loud noises, or extended classroom assignments, on average, approximately every one-and-a-half or two minutes. Student returned to task independently within 30 seconds, or by making eye contact with the teacher, or by waiting for teacher prompting and instruction.

NPA behavior progress report

44. On April 15, 2012 Student’s at home NPA behavior provider, Ms. Torres, prepared a progress report for the IEP team. Student achieved his behavior goal of independently stopping self-injurious behaviors and using appropriate coping strategies when frustrated, scared, or angry, with 90 percent accuracy during four of five trials.

45. Ms. Torres reported that Student had not engaged in self-injurious behaviors in the presence of the BII or BID service providers for the reporting period covered in the report, December 5, 2011, through March 5, 2012. Student successfully engaged in functional communication, which encompassed verbalizing his feelings, needs, and wants, instead of engaging in self-injurious behaviors to cope with fright or frustration.

46. In contrast, during that same reporting period, parents reported that Student engaged in self-injurious behaviors 13 days per month, in the absence of the BII and BID providers, stopping after one to two prompts.

47. Following the behavior goal set at the April 2011 IEP team meeting, Student’s NPA BID taught Student’s Mother the use of appropriate interventions to further Student’s generalization of appropriate behaviors in a variety of settings, including, the home and community, and in the presence of other adults. Ms. Torres reported that Mother was actively involved in the behavior intervention plan and was implementing the same strategies that the interventionist used. The BID’s parent training focused on eliminating Student’s self-injurious behavior when the BII and BID were absent. The BID monitored and

supervised the implementation of the BIP by Student's Mother so that Student would continue to progress in coping with frustration in different situations and environments.

Student's April 17, 2012 Annual IEP team meeting

48. Student's annual IEP team meeting was held on April 17, 2012. All necessary members of the IEP team were present. Among the participants were Mother, Mr. Yeung, Ms. McAllister-James, and Ms. Torres. Huntington's Bridge Coordinator, Jenaro Torres, who was responsible for coordinating the IEP team meeting, and the IEP's, was also present and testified at hearing. Mother was provided a Spanish-language interpreter. There was no issue regarding Student's placement. He would remain in Mr. Yeung's classroom with supervision from a total of four aides throughout the day.

49. After reviewing Ms. McAllister-James's LAS report, and Ms. Melvey's progress report, District IEP team members concluded that Student no longer required one-on-one LAS services from the NPA service provider. Student had achieved his school-based IEP goal to increase his intelligibility using compensatory strategies such as self-monitoring and correction with 70 percent accuracy in three of five trials with moderate cues and prompts from in three of five trials, in both structured and unstructured activities. The IEP team offered group speech at Huntington with a District provider for 60 minutes per week.

50. Mother disputed Ms. McAllister-James's LAS report, and was especially critical of Ms. McAllister-James's omission of specific recommendations in the report. Mother stated that it would be good to get another opinion about Student's speech and language needs and services before terminating his NPA. She did not specifically request an IEE at public expense, as was her right under the IDEA procedural safeguards.

51. At the IEP team meeting, District members of the IEP team recommended that Student's NPA behavior services be terminated. District members based their recommendations on Mr. Yeung's FBA and Ms. Torres's progress report. Both Mr. Yeung and Ms. Torres found that Student had not demonstrated any self-injurious behaviors during his sessions with the NPA behaviorist. In his home program, Student had met his behavior goal to eliminate Student's self-injurious behaviors by applying coping strategies when he was frustrated, scared, and angry, in four of five trials.

52. Instead of continuing at-home behavior services, District IEP team members offered a behavior support plan (BSP), developed from Mr. Yeung's FBA, to address Student's off-task behaviors and short attention span at school. The BSP provided for redirection, positive reinforcement, breaks, and shortened work assignments which could easily be accommodated in Student's alternative curriculum.

53. Mother disagreed with the IEP team's recommendation that at home behavior support should be terminated. She insisted, as she had in the past, that Student's self-injurious behaviors persisted in the home.

54. Mother did not consent to the IEP. She told the IEP team that she would be reviewing the IEP with her legal counsel and would contact Mr. Torres with her comments once her review was completed. Mother received documentation outlining her procedural safeguards.

55. At hearing, the parties elaborated on their positions regarding the appropriateness of District's IEP offer in the areas of LAS and behavior. Ms. McAllister-James supplemented her LAS assessment. She noted she observed Student during his weekly sessions, which included three other pupils, and he was generally talkative and able to make his needs known. Ms. McAllister-James insisted that her findings were supported by at least four classroom observations of 15-20 minutes each, where she observed Student interacting with the teacher and other pupils. On one occasion she saw Student speaking with one of his friends and then stating that "(Pupil's name) is angry." Ms. McAllister-James was not certain of Student's specific level of cognitive ability, but from her tests and observations she considered his developmental age to be years below his chronological age.

56. At hearing, Ms. Melvey, Student's NPA speech provider, who did not attend the IEP team meeting, concurred with Ms. McAllister-James's opinion that Student functioned consistent with his (unspecified) developmental, not chronological, age. She agreed that Student had plateaued because Student had not made progress in about a year. Ms. Melvey would not speculate as to whether Student was capable of further progress or whether he would regress without continued services.

57. Ms. Melvey provided Student with opportunities to converse with others during their sessions. Although designed as one-on-one speech therapy, Ms. Melvey found it useful to have Student speak to other people in the clinic to work on his goal.

58. At hearing, Mother further explained her disagreement with Ms. McAllister-James's assessment. She disagreed with Ms. McAllister-James's estimate of Student's intelligibility. Mother testified that Student's speech was understandable to those who dealt with him regularly, and those that generally limited their conversations with him to "scripted," questions, or familiar content. From her observations, she reported that Student's speech was not sufficiently intelligible for him to communicate his needs to other's not familiar with him, so that he could become more self-sufficient and independent.

59. Mother's further reason to continue NPA speech was her lack of confidence in the District's ability to provide consistent weekly speech services. District stated that school-based speech sessions could be rescheduled if the speech pathologist was required to attend IEP meetings. Mother did not have any evidence that Student was deprived of the offered number of school-based speech sessions due to the speech pathologist's scheduling conflicts, or absences, since the April 2011 IEP. Nevertheless, she maintained that reliable weekly NPA sessions were more appropriate to Student, who was familiar with, and happily engaged with the NPA.

60. At hearing, Mother also provided an additional rationale for continuing Student's NPA BII and BID at-home services. Mother argued that based upon the FBA, Student's attention span was extremely short, and that he required assistance to stay on task. She questioned the ability of his teachers to redirect him each one-and-a-half minutes he lost attention. She lamented abandoning one-on-one assistance at school years before. She was not convinced that Student received the required attention to navigate through the school during transitions between classes, and during bathroom and nutrition breaks. When she came to the school to observe she did not observe any assistants accompanying Student to the restroom, or through the halls. She observed Student sitting alone in the lunch room. Admittedly, at school Mother did not observe Student aimlessly wandering the campus, or engaging in self-injurious behaviors. Although she had no information that Student had problems, she was concerned that lax oversight would lead to problems with other pupils, particularly females.

61. Four months after the April 17, 2012 IEP, on August 20, 2012, Mother met with Mr. Torres at his office to lodge her objections to the IEP. Mother dictated her concerns to Mr. Torres and Mr. Torres recorded verbatim Mother's concerns in the comment section of the IEP. Mother stated that she disagreed with the LAS assessment and the termination of NPA speech services. She requested an LAS IEE. Mother disagreed with the termination of NPA behavior BII and BID services. She reported that Student still engaged in self-injurious behaviors at home. Mother requested meal time and transition supervision. Mother also requested that existing services remain as stay put.

62. Mr. Torres recorded District's position as a "rebuttal," and responded to Mother's position in the parent comment section. On behalf of District, Mr. Torres reported that the IEP team, excepting Mother, agreed with District's LAS assessment. He reported that the IEP team, based upon District's assessment, agreed that Student's speech and language needs could be met through school-based group speech and classroom support. As to Mother's request for continued BII and BID services, Mr. Torres reported that the IEP team's recommendation to terminate BII and BID services was based upon the FBA and the NPA report. As to Mother's concern about Student's mealtime and transition supervision, Mr. Torres stated that Huntington had a "strategic" structure in place to support Student throughout the day, including mealtime and transitions.

63. Mr. Torres reviewed Mother's dispute resolution options as set forth on the IEP parent participation section: District's informal dispute resolution process; request for mediation only with the "State" (OAH), and formal due process proceedings (also with OAH). Mother elected to file for formal due process with OAH.

64. Mother executed the due process hearing complaint form on August 20, 2012, and Mr. Torres sent it to District's due process unit on or about August 24, 2012. OAH received the complaint on September 4, 2012. Mr. Torres did not discuss with Mother due process procedures specifically governing her request for IEE's.

65. District never filed a due process hearing request.

LEGAL CONCLUSIONS

Burden of Proof

1. As the petitioning party, Student has the burden of persuasion on all issues. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].)

Issue One: Failure to fund an LAS IEE at public expense

2. Student contends District denied him a FAPE when it failed to fund a speech and language IEE at public expense. District disagreed and maintained that its assessment was appropriate. District further maintained that it was not required to file a request for due process due to the timing of Student's filing for due process, and the inclusion of Mother's request for an IEE in his complaint. As will be discussed below, Student met his burden of proof as to Issue One.

Applicable Law

3. California special education law and the IDEA provide that children with disabilities have the right to a FAPE that emphasizes special education and related services designed to meet their unique needs and to prepare them for employment and independent living. (20 U.S.C. § 1400(d); Ed. Code, § 56000.) Under the IDEA, eligible children with disabilities are entitled to a FAPE, which means special education and related services that are available to the child at no charge to the parent or guardian, meet State educational standards, and conform to the child's individualized education program. (See 20 U.S.C. §§ 1400(d), 1401(3), 1401(9), 1401(29), 1412(a); Ed. Code, §§ 56001, 56026, 56040.) "Special education" is defined as "specially designed instruction at no cost to the parents, to meet the unique needs of a child with a disability...." (20 U.S.C. § 1401(29).) California law also defines special education as instruction designed to meet the unique needs of individuals with exceptional needs coupled with related services as needed to enable the student to benefit fully from instruction. (Ed. Code, § 56031.) "Related services" are developmental, corrective and supportive services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26).) In California, related services are called designated instruction and services (DIS), which must be provided if they may be required to assist the child in benefiting from special education. (Ed. Code, § 56363, subd. (a).) DIS services may include LAS therapy. (Ed. Code, § 56363, subd. (a) & (b)(1).)

4. In *Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 200 [102 S.Ct. 3034] ("*Rowley*"), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a

child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.) *In County of San Diego v. California Special Education Hearing Office, et al.* (1996) 93 F.3d 1458, 1467, the court specified that educational benefit is not limited to academic needs, but also includes the social and emotional needs that affect academic progress, school behavior, and socialization.

5. There is no one test for measuring the adequacy of educational benefits conferred under an IEP. (*Rowley, supra*, 458 U.S. at pp. 202, 203 fn. 25.) A student’s failure to perform at grade level is not necessarily indicative of a denial of a FAPE, as long as the student is making progress commensurate with his abilities. (*Walczak v. Florida Union Free School Dist.* (2nd Cir. 1998) 142 F.3d 119, 130; *E.S. v. Independent School Dist., No. 196* (8th Cir. 1998) 135 F.3d 566, 569; *In re Conklin* (4th Cir. 1991) 946 F.2d 306, 313; *El Paso Independent School Dist. v. Robert W.* (W.D.Tex. 1995) 898 F.Supp.442, 449-450.) Progress may be found even when a student’s scores remain severely depressed in terms of percentile ranking and age equivalence, as long as some progress toward some goals can be shown. (*Coale v. Delaware Dept. of Educ.* (D.Del. 2001) 162 F.Supp.2d 316, 328.) Whether a student has received more than *de minimis* benefit must be measured in relation to the student’s potential. (*Mrs. B. v. Milford Bd. of Educ.* (2d Cir. 1997) 103 F.3d 1114, 1121; *Polk v. Central Susquehanna Intermediate Unit 16* (3d Cir. 1988) 853 F.2d 171, 185.)

6. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district’s proposed program. (See *Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) For a school district’s offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district’s offer of educational services and/or placement must be designed to meet the student’s unique needs, comport with the student’s IEP, and be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. (*Ibid.*) *Rowley* also made clear that IDEA does not provide for an “education...designed according to the parent’s desires.” (*Id.* at p. 207.) What the statute guarantees is an appropriate education, “not one that provides everything that might be thought desirable by loving parents. [citation omitted]” (*Tucker v. Bay Shore Union Free School Dist.* (2d Cir. 1989) 873 F.2d 564, 567 .)

7. In developing an IEP, the team must consider the following factors: (1) the strengths of the child; (2) the concerns of the parents for enhancing the education of their child; (3) the results of the most recent evaluations of the child; and (4) the academic, developmental and functional needs of the child. (20 U.S.C. § 1414(d)(3); 34 C.F.R. § 300.324(a); Ed. Code, § 56341.1, subd. (a).)

8. An IEP is evaluated in light of the information available to the IEP team at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) “An IEP is a snapshot, not a retrospective.” (*Id.* at p.1149, citing *Fuhrman v. East Hanover Bd. of Educ.* (3d Cir. 1993) 93 F.2d 1031, 1041.)

9. A student may be entitled to an IEE if he or she disagrees with an evaluation obtained by the public agency and requests an IEE at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1)(2006); Ed. Code, § 56329, subd. (b) [incorporating 34 C.F.R. § 300.502 by reference]; Ed. Code, § 56506, subd. (c) [parent has the right to an IEE as set forth in Ed. Code, § 56329]; see also 20 U.S.C. § 1415(d)(2) [requiring procedural safeguards notice to parents to include information about obtaining an IEE].) In response to a request for an IEE, an educational agency must, without unnecessary delay, either: 1) File a due process complaint to request a hearing to show that its evaluation is appropriate; or 2) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§ 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria. (34 C.F.R. § 300.502(b)(2) (2006) ; see also Ed. Code, § 56329, subd. (c) [providing that a public agency may initiate a due process hearing to show that its assessment was appropriate].)

10. Whether the length of time that has passed before a District initiates a due process hearing or provides the IEE at public expense constitutes "unnecessary delay" is a question of fact, based upon the circumstances of the particular case. (*J.P. v. Ripon Unified School Dist.* (E.D. Cal. 2009) 2009 WL 1034993; 52 IDELR 125.) For example, in *Ripon* the court determined that the school district's due process request filed more than two months after the request for an IEE was timely, as the parties were communicating regarding the request for the IEE in the interim, and did not come to an impasse on the issue until less than three weeks before the school district's filing. In contrast, in the case of *Pajaro Valley Unified School Dist. v. J.S.(Pajaro Valley)* (N.D. Cal. 2006) 2006 WL 3734289; 47 IDELR 12) the school district did not file its due process complaint to defend its assessment until approximately 11 weeks after Student's request for an IEE. Then, at hearing, the school district offered no explanation as to why it delayed for 11 weeks in filing its complaint, or why that delay was "necessary." The court found that the school district's "unexplained and unnecessary delay in filing for a due process hearing waived its right to contest Student's request for an independent evaluation at public expense, and *by itself* warranted entry of judgment in favor of Student and [parent]." (Emphasis added.) (*Pajaro Valley, supra*, at p. *3.)

11. To be an appropriate assessment, District's assessment must be conducted in a way that: 1) uses a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent; 2) does not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability; and 3) uses technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. The assessments used must be: 1) selected and administered so as not to be discriminatory on a racial or cultural basis; 2) provided in a language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally; 3) used for purposes for which the assessments are valid and reliable; 4) administered by trained and knowledgeable personnel; and 5) administered in accordance with any instructions provided by the producer of such assessments. (20 U.S.C. §§ 1414(b) & (c)(5); Ed. Code, §§ 56320, subds. (a) & (b), 56381, subd. (h).)

12. To be an appropriate assessment, the personnel who assess the student must prepare a written report that includes, without limitation, the following: 1) whether the student may need special education and related services; 2) the basis for making that determination; 3) the relevant behavior noted during observation of the student in an appropriate setting; 4) the relationship of that behavior to the student's academic and social functioning; 5) the educationally relevant health, development and medical findings, if any; 6) if appropriate, a determination of the effects of environmental, cultural, or economic disadvantage; and 7) consistent with superintendent guidelines for low incidence disabilities (those effecting less than one percent of the total statewide enrollment in grades K through 12), the need for specialized services, materials, and equipment. (Ed. Code, § 56327.) The report must be provided to the parent at the IEP team meeting regarding the assessment. (Ed. Code, § 56329, subd. (a)(3).)

Analysis of Issue One:

13. In this case, the law required that the District do one of two things, without unnecessary delay: (1) initiate a due process hearing to show that its speech and language assessment was appropriate; or (2) provide a speech and language IEE at public expense, as requested by Mother. The evidence established that on August 20, 2012, Mother formally requested an IEE. Mother stated that she made the request earlier at the April 17, 2012 IEP team meeting, but her evidence was not persuasive. Mother stated that another opinion would be useful, but instead of making a formal request for an IEE at the April 17, 2012, IEP team meeting, Mother told the team that she was deferring her comments until she reviewed the IEP with legal counsel. Based upon Mother's decision to defer her comments about the IEP and seek a legal opinion, Mother's comments about getting another opinion could not be construed as a formal request for an IEE. Undisputedly, four months after the IEP, on August 20, 2012, Mother met with Mr. Torres and formally lodged her request for an LAS IEE. Mr. Torres recorded Mother's request for an LAS IEE in the parent comment section, along with District's position.

14. As mandated by Legal Conclusions 9 and 10, District was obligated to provide an IEE, because it failed to file for due process without unnecessary delay. District provided no legal support for discharging its statutory obligation to file for due process at any time between August 20, 2012, and the date of hearing, 70 days later.

15. Student's election to file a formal due process request immediately after Mr. Torres notified her of District's response, did not excuse District's unnecessary delay. The IEP form included three options, and Mother chose one, formal due process. District was notified immediately of her election during her meeting with Mr. Torres, a Huntington administrator, on August 20, 2012. Mother prepared the complaint form for Mr. Torres, and Mr. Torres forwarded the complaint to District's due process unit on August 24, 2012. OAH received the complaint on September 4, 2012. District had ample time to file its request for due process in the 70 days that elapsed between the time Mother notified Mr. Torres, and the first day of hearing. Further, even assuming District's obligation to file was not triggered until the due process unit received Student's complaint from Mr. Torres, it still had a

reasonable time to file before the hearing, and failed to do so. Mr. Torres sent Student's complaint to the due process unit by facsimile on August 24, 2012, about 66 days before hearing.

16. The IDEA simply does not allow District to respond to a request for an IEE by doing nothing or with statements that it disagreed with Mother's concerns because all other members of the IEP team agreed with a reduced services recommendation. Here, rather than explaining to Mother that District would either provide an IEE or file for due process, District let Mother file and then took the position that it did not have to do anything because Mother had filed first. District's actions are inconsistent with the spirit of the IDEA which requires District to provide an IEE unless it successfully bears the burden of demonstrating that its assessment was proper. District's election not to file during the 70 day period, and try to shift the burden of proof to parent, constituted unnecessary delay. For this reason, Student is entitled to an LAS IEE at public expense.

17. District maintains that it was not required to fund an LAS IEE at public expense because it demonstrated at the due process hearing that its assessment was appropriate. District cites no authority that, under the circumstances of this case, any such showing can substitute for the District's specific obligation to file a due process complaint without unreasonable delay to demonstrate the appropriateness of its assessment. Due to District's failure to abide by the statutory mandate to either consent to Parent's request for an IEE, or file for due process without unnecessary delay, it is not necessary to determine whether District's LAS assessment was appropriate. Student does not have the burden of proving that District's assessment was inappropriate, and having not filed itself, District was not entitled to prove the appropriateness of its assessment to bar the Student's IEE.

18. In sum, Student met his burden of proof on Issue One. Student is entitled to an a LAS IEE at public expense, funded by District. (Legal Conclusions 1 through 18, and Factual Findings 50, and 61 through 65.)

Issue Two: Failure to offer NPA LAS services for 60 minutes per week.

19. Student contends District's failure to continue Student's one-on-one NPA LAS services as part of its April 17, 2012 IEP, denied him a FAPE. Student contends that District could not provide reliable and consistent services. Student also contends that the school-based services offered were not sufficient. District disagrees, and maintains that Student failed to provide any evidence that District could not implement the offered LAS services, or that Student's needs could not be served by school-based services. For the following reasons, Student failed to meet his burden of proof that District denied Student a FAPE by terminating NPA LAS speech.

Applicable Law

20. Legal Conclusions 1, and 3 through 8, are incorporated herein by this reference.

Analysis of Issue Two:

21. Student did not meet his burden of proof that NPA services were required. There was no evidence that District could not implement the services it offered at school. Mother had problems with District in the past, but she offered no proof that District failed to provide the school-based speech services it had offered in the prior year IEP that was consented to in April of 2011. While it was evident that Student enjoyed going to the NPA, and that NPA services occurred consistently each week at the same time, as set forth in Legal Conclusion 6, Student's preference does not govern the disposition of the issue. The schedule for school-based services might change when a speech pathologist was summoned to an IEP team meeting, but Student provided no evidence that during 2011-2012 the number and duration of sessions promised were not provided, or that Student's services were consistently interrupted to the point that the quality or frequency of services were altered. As set forth in Legal Conclusions 4 through 6, District was only required to provide services that provided some educational benefit, and was not required to provide the program Mother preferred. NPA services might have been ideal for Student from Mother's perspective, but District was not required to provide NPA services when it could have implemented LAS services at school.

22. Student failed to prove by a preponderance of the evidence that District's offer of 60 minutes of school-based group speech was inappropriate. It is not necessary to determine the appropriateness of Ms. McAllister-James's assessment, as referenced in Legal Conclusions 11 and 12, to conclude from the evidence that the IEP team was presented with conflicting information about whether Student could still benefit from LAS services. From her report it was clear that Ms. McAllister-James was uncertain about whether Student could benefit further from speech services. Ms. McAllister-James concluded that Student "may" benefit from continued speech services, but failed to specify any services in her report. NPA speech pathologist, Ms. Melvey believed that Student needed to continue speech therapy as part of his related services, but nothing in her opinion supported a conclusion that it had to be at the same frequency and duration as in prior IEP's. Based upon Student's performance over the last year, Ms. Melvey concluded that he has plateaued and she was uncertain as to whether Student could progress further.

23. In addition, Student failed to prove by a preponderance of the evidence that District's offer of group speech was inappropriate based upon his performance and progress at the NPA. Although designated as one-to-one speech therapy, Ms. Melvey actually had Student communicate with others at the clinic to work on his intelligibility, like would be done in a school-based group speech therapy session. At a minimum, based upon her practice having Student communicate with others at the clinic, Ms. Melvey's testimony proved that Student might continue to receive a benefit from group speech. Ms. Melvey's testimony did not establish that Student required continued NPA individual speech therapy in order to receive a FAPE.

24. In sum, Student failed to meet his burden of proof that he was denied a FAPE when District failed to offer NPA speech. (Legal Conclusions 21 through 23, and Factual Findings 1 through 35, 48 through 50, 54 through 59, and 61 through 62.)

Issue Three: Failure to offer continued BII and BID services at-home.

25. Student contends that District's decision to terminate at-home BII and BID services denied him a FAPE. Student alleged that his self-injurious behaviors persisted with the family, despite the absence of these behaviors in the presence of his BII and BID providers at home or his teachers and aides at school. Although secured to address self-injurious behaviors, Student alleged that the services are also required for his short attention span. Student alleged that District's FBA underestimated Student's attention deficits. District disagreed that Student required any further at-home BII and BID services as there was no evidence that Student engaged in self-injurious behaviors at the home, for the last reporting period prior to the IEP team meeting, or in the presence of anyone at the school site. District disagreed that Student required at-home services to address his short attention span. For the following reasons, Student failed to meet his burden of proof.

Applicable Law

26. Legal Conclusions 1, and 3 through 8, are incorporated herein by this reference.

27. In the case of a child whose behavior impedes his or her learning or that of others, the IEP team must consider, when appropriate, "strategies, including positive behavioral interventions, strategies, and supports to address that behavior." (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i); Ed. Code, § 56341.1, subd. (b)(1).) California law defines behavioral interventions as the "systematic implementation of procedures that result in lasting positive changes in the individual's behavior," including the "design, implementation, and evaluation of individual or group instructional and environmental modifications . . . designed to provide the individual with greater access to a variety of community settings, social contacts and public events; and ensure the individual's right to placement in the LRE as outlined in the individual's IEP." (Cal. Code Regs., tit. 5, § 3001, subd. (d).) The regulations implementing the IDEA do not require that any particular methodology, strategy or technique be used to develop a behavior support or intervention plan for pupils. (71 Fed. Reg. 46683 (Aug. 14, 2006).)

28. The California Legislature intended that if behavior interventions were used for a special education student, that such interventions "ensure a pupil's right to placement in the least restrictive environment (LRE)." (Ed. Code, § 56520, subd. (b)(1); Cal. Code Regs., tit. 5, § 3001, subd. (d).)

Analysis of Issue Three:

29. Here, there was absolutely no evidence that Student required behavioral services at home, either in the form of BII or BID, to address Student's self-injurious behaviors at school. Student had been provided BII and BID services at school for an unknown period of time prior to spring 2008, at which time the team, including Mother, agreed that Student no longer required these services. There was no evidence that Student engaged in any self-injurious behaviors at school since that time. Student's teachers, including Mr. Yeung, uniformly reported that Student was polite, compliant and cheerful. In other words, during the four year period that elapsed between spring 2008, and the April 17, 2012, IEP, Student had not engaged in any self-injurious behaviors at school.

30. There was no evidence that Student required behavioral services at home to further his functional educational program by addressing self-injurious behaviors in the community. There was no evidence at the time of the April 2011 IEP team meeting, or one year later, at the April 2012 IEP team meeting that Student was engaging in self-injurious behaviors in the community. Student began receiving at-home BII and BID services for reasons other than special education under California's Lanterman Act in 2007, and in October 2009 District began funding at-home BII and BID services at the current level for reported self-injurious behaviors. The goal for the at-home behavioral services had remained the same: to reduce Student's self-injurious behaviors by teaching Student and Mother strategies for coping with his frustration. Since the April 2011 IEP team meeting, the only witness to Student's self-injurious behaviors had been his parents, mainly Mother. Student had not engaged in self-injurious behaviors in the presence of his BII and BID providers, and Student presented no evidence of self-injurious behaviors in the home that were related to school work.

31. District's termination of Student's at-home behavior services at the April 2012 was appropriate as nothing had changed since it continued the services one year earlier at the April 2011 IEP team meeting, as a fading plan. At that time, based upon Mother's representation that Student's self-injurious behaviors persisted, District provided continued home BII and BID services to provide Student and his parents with instruction to address his self-injurious behaviors. With Mother's consent, the IEP team characterized the continued home service as a fading plan. Mother was provided training and instituted the interventions the NPA recommended. When Student again failed to engage publicly in any self-injurious behaviors, one year later, District made an appropriate determination that at-home services were no longer required.

32. Mother's insistence that Student continued to engage in self-injurious behaviors with the family at least 13 times per month, by itself, did not support continued services. Mother had made the same claim the year before, and District continued the services to provide her with instruction. District was not required to continue the services to further Student's functional educational program, especially where Student demonstrated that he had progressed to the point of acquiring the coping mechanisms necessary to participate in school and the community.

33. Student's claim that at-home behavior services were required to support his attention deficits was not supported by the record. At home behavior services were never designed to directly assist with Student's attention deficits. Student's behavior services were designed to address his frustration, fright, and anger, from any cause, leading to self-injurious behaviors. His behaviorists instructed both Student and his parents on coping strategies to avoid self-injurious behaviors. Moreover, from the information provided to the April 17, 2012, IEP team, principally from Mr. Yeung's interviews with Student's teachers and Mother, Student's attention span was short, and he was distracted, on average, every one and a half minutes. However, although there was evidence that Student's off task behavior at school affected his ability to focus on his functional academics and general education electives, there was insufficient evidence that addressing Student's attention span with at-home behaviorists was required to further his functional educational program.

34. In sum, Student failed to meet his burden of proof that District denied Student a FAPE by not offering at-home BII and BID services at the April 17, 2012, IEP team meeting. (Legal Conclusions 26 through 33, and Factual Findings 1 through 22, 36 through 48, 51 through 54, and 60 through 62.)

Issue Four: Failure to offer appropriate supports at school during transitions and meal times

35. Student contends that District failed to provide him a FAPE by depriving him of an assistant to help him navigate the campus and the lunchroom. Student argued that Mr. Yeung's FBA and the District's BSP understated the degree to which Student's attention deficits impacted his ability to access his education, particularly his ability to navigate the campus. Student's Mother was particularly worried that District's failure to provide sufficient assistance would lead to conflict between Student and other pupils. District disagreed, and maintained that it provided the necessary support for Student to navigate the campus, and to attend to his nutrition time. For the reasons set forth below, Student failed to meet his burden of proof.

Applicable Law

36. Legal Conclusions 1, 3 through 8, and 27 through 33, are incorporated herein by this reference.

Analysis of Issue Four:

37. Student did not meet his burden of proof that he required an assistant, or any additional personnel support, to navigate transitions in his school day. Mother lamented her agreement years before to drop Student's one-on-one assistant on the promise that Student would have enough classroom support. Mother observed that Student had no support when he travelled between classes, went to the bathroom, or sat in the lunch room. Her fear was not based on any events she had observed, but the possibility that Student would face problems because of his limited insight, especially with female pupils. Mother's fears as a

parent, although understandable, were not based on any event or circumstance that was brought to the attention of the IEP team at, or prior to, the April 17, 2012, IEP team meeting. On the contrary, at the time of the IEP team meeting, there were no incidents reported of Student having difficulty navigating through the campus, or at mealtime. Mr. Yeung capably testified that he had several classroom aides, and at all times, there was an aide monitoring his pupils' transitions between classes, bathroom breaks, and at lunch. Mr. Yeung's pupils travelled in groups, and classroom assistants kept their distance to encourage independence. As set forth in Legal Conclusions 27 and 28, behavioral interventions were designed to support Student's ability to function in the LRE. Based upon Student's failure to provide any evidence, or contradict Mr. Yeung's observations, Student failed to meet his burden of proof District denied him a FAPE by failing to provide him an assistant or more supports to navigate through the campus.

38. Student did not directly challenge whether the FBA was appropriate, but at hearing, Mother referred to the FBA to support Student's contention that the offer was inappropriate. Mother critiqued Mr. Yeung's FBA and subsequent BSP, for underestimating the impact of Student's short attention span on his access to education. Mother appeared to be arguing that if properly interpreted, Student required an aide. Student failed to show that Mr. Yeung's FBA provided foundation for requiring more aide support on campus. Mr. Yeung's data about Student's attention did not support Student's claim that he required more assistance to navigate transitions. The FBA consisted of a few short, direct, school-based observations, and many interviews. Mother's critique of Mr. Yeung's optimistic characterization of Student's ability to attend to school tasks was well taken. Student did lose focus, on average, every one-and-a-half minutes, and required redirection. However, Mother was mistaken, that this fact alone, without more evidence, required District to offer Student more assistance than he had. From Mr. Yeung's interviews with his teachers and his observations, Student lost focus because the work was either too hard, or he became distracted by loud noises. However, while District could not guarantee that his teachers or his classroom aides would catch him each time he lost focus, Student failed to provide any evidence that Student could not access his education, particularly his transitions, which were the focus of his due process complaint, with the BSP offered, and the aides already in place. From Mr. Yeung's report and interviews, Student demonstrated that he could take breaks, when needed, without prompting, and that he refocused quickly with minimum prompting.

39. In sum, Student failed to meet his burden of proof that District denied him a FAPE by failing to offer him appropriate supports during transitions. (Legal Conclusions 36 through 38, and Factual Findings 1 through 22, 36 through 48, 51 through 54, and 60 through 62.)

ORDER

1. Student is entitled to an LAS IEE at public expense, funded by District. District shall supply Student with a list of bi-lingual independent LAS assessors, and the required agency criteria for securing an assessor, no later than January 8, 2013. Student is

not required to use the assessor's recommended by District, but must use an assessor that meets agency criteria.

2. Student shall secure a bi-lingual LAS assessor that meets agency criteria, no later than February 1, 2013, and notify District of the identity of the assessor and payment information.

3. District shall cooperate with Student's assessor to arrange for direct payment to the assessor, and shall pay assessor within 30 days of receipt of the assessor's bill. District shall also pay for the assessor to appear at the IEP team meeting convened to review the LAS IEE. District shall schedule the IEP team meeting no later than 30 days from the receipt of the assessor's report. District shall use best efforts to schedule the IEP to accommodate the LAS assessor's schedule, and may extend the timeline for the IEP, with parent's permission, to accommodate the assessor's schedule.

4. All of Student's other requests for relief are denied.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, Student prevailed on Issue one, and District prevailed on Issues two, three and four.

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this Decision. (Ed. Code, § 56505, subd. (k).)

DATED: December 14, 2012

/s/
EILEEN M. COHN
Administrative Law Judge
Office of Administrative Hearings